The Negro in Our Law

*By Eugene V. Rostow**

It is a high compliment to have been asked to give the William H. Leary Leeture. Dean Leary was a notable figure in a great generation of law teachers. He left an enduring monument in the quiet strength of this College of Law, and in the affectionate recollection in which he is held by his students, his colleagues and his fellow citizens. I am pleased to be allowed to help celebrate his work. I hope, in our turn, that we in this generation build half as well.

It is a compliment, too, to have been included among my predecessors. I know, admire, and respect all four of the Leary Lecturers who have been here before, and I am honored to be listed with them. And finally, most important of all, to my mind, I am delighted that your distinguished Dean and his lively colleagues thought to invite me.

As I told Dean Thurman when we made the arrangements for this evening, I have been trying to complete a book about the status of the Negro in our law, and in this paper, with his permission and approval, I shall try to summarize some of the findings of that study.

I.

One could start the story at any one of a number of points. I might state my theme in its most general form by recalling *Somerset*'s case.[1]

In 1769, a Virginian named Stewart or Steuart took one of his slaves with him on a business trip to England. The slave's name is given as James Somerset or Sommersett. He left his master in 1771. Stewart then had Somerset seized and placed in irons on a ship in the Thames, planning to send him to Jamaica, and there to sell him for plantation work. Somerset's friends applied for a writ of habeas corpus, which came before Lord Mansfield, who referred it to the whole Court of King's Bench. The case was argued at length, and with fervor, exciting considerable general interest.[2] There are several versions of Mansfield's opinion freeing Somerset.[3]

Lord Mansfield refused to give effect in England to the master's authority over the slave derived from the law of Virginia, even though Virginia was then a colony in which slavery had been authorized by act of the British Parliament. It was plausibly argued that slavery, like marriage, for example, and other relations of status, should be considered in the light of the law of the state where the relationship was formed and where master and slave were domiciled —

---

* Professor of Law, Yale University; A.B., 1933, LL.B., 1937, M.A., 1959, Yale University.

[1] Somerset v. Stewart, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772).

[2] See 2 BOSWELL, THE LIFE OF SAMUEL JOHNSON 476–77 (Hill ed. Powell rev. 1934); 3 *id.* at 87, 212. Lord Mansfield refers with approval to the arguments of counsel and adds, "I cannot omit to express particular happiness in seeing young men, just called to the Bar, have been able so much to profit by their reading." Somerset v. Stewart, Lofft 1, 18, 98 Eng. Rep. 499, 509 (K.B. 1772). He assumed that the decision would free 14,000 or 15,000 slaves then living in England. *Id.* at 17, 98 Eng. Rep. 509.

[3] Note 1 *supra*; 20 How. St. Tr. 1, 1369 (K.B. 1772).

in this instance, Virginia. Following this line of thought, counsel for Stewart, in the name of comity, asked the court to treat the legal relationship between master and slave as valid in England because it was valid in Virginia. But Lord Mansfield said that "So high an act of dominion must be recognized by the law of the country where it is used. . . . The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law." [4] There being no positive law, a phrase by which he probably meant no legislation or binding precedent authorizing such slavery in England, Lord Mansfield concluded, "I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged." [5]

Mansfield's position has powerful echoes of the Roman law, where slavery was regarded as contrary to the law of nature. It was generally said by the Roman lawyers that slavery could be upheld only on the basis of customary law, *ius gentium*.[6]

Cardozo, invoking Mansfield with Marshall to illustrate the magisterial style in writing opinions, was once misled into quoting from a more eloquent passage with which Campbell had embellished Mansfield's prose:

> I care not for the supposed dicta of judges, however eminent, if they be contrary to all principle. . . . Villainage, when it did exist in this country, differed in many particulars from West India slavery. . . . At any rate villainage has ceased in England, and it cannot be revived. The air of England has long been too pure for a slave, and every man is free who breathes it.[7]

However authentic the rhetoric attributed to Mansfield's opinion may be, the court's decision in *Somerset* was clear: let the black go free.

This was the law of England in the 1770's.[8] It was not then the law of the American colonies, and for many long years it was not the law of the United States. One must add that it is not even now the law in fact in every part of the United States.

---

[4] Somerset v. Stewart, Lofft 1, 19, 98 Eng. Rep. 499, 510 (K.B. 1772).

[5] *Ibid.* The judge conceded that contracts for the sale of slaves were enforceable at law in English courts. *Id.* at 17, 98 Eng. Rep. at 509.

[6] JOLOWICZ, HISTORICAL INTRODUCTION TO ROMAN LAW 105, 135–38, 269–71 (2d ed. 1952).

[7] CARDOZO, LAW AND LITERATURE 13–14 (1931); see 4 CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 133–35 (1899). The final flourish echoes a remark in *Cartwright*'s case as reported in 2 RUSHWORTH, HISTORICAL COLLECTION 468 (1721), where the court did indeed say that "England was too pure an Air for Slaves to breath in."

[8] *Somerset* leaves many legal questions unanswered: Did the writ, for example, dissolve the relation of slavery, like a bill of divorcement, or only deny the master the power to exercise any control over the slave in England? What would happen to the relationship if the master and slave returned to Virginia after a sojourn in England — the exact factual analogue to the *Dred Scott* case less than a hundred years later. In 1827, Lord Stowell answered that question as the Supreme Court did in *Dred Scott*, in the case of The King v. Allen, 2 Hagg. 94, 166 Eng. Rep. 179 (Adm. 1827) (popularly known as *The Slave Grace* case); *cf.* The Antelope, 23 U.S. (10 Wheat.) 66 (1825). See also 1 W.W. STORY, LIFE AND LETTERS OF JOSEPH STORY 558 (1851).

Yet in the 1770's, and throughout our history as a nation, every judge, and every thoughtful man, knew that the principle of *Somerset*'s case should have been our law too. That conviction, like the knowledge of evil, has been the source of much in our law, and in our lives: a restless, uneasy pressure for change; a sense of guilt; a zeal for liberty.

This is the topic with which I shall try to deal here — the place of the Negro in our law, why it was what it was, and how it became what it is today.

I should begin by making it clear that my work is not drawn from fresh research in the vast archives of the subject. It is, rather, an attempt at reflection and observation intended to help us govern the future by examining it in the perspective of the past.

For I am of the school that views policymaking as the goal of historical studies, as it is the proper goal of every other approach to the study of society. We renew contact with what came before not in the spirit of nostalgia or antiquarianism, but because we know that the memories of our experience as a people, conscious and unconscious, play a large part in determining what we are and how we perceive the world around us. The forces that shape our national personality and character correspondingly restrict our freedom of choice. They define the range within which planned change is possible at any moment of time. And they prescribe the hierarchy of values we seek to fulfill in making such choices as are in fact open to us.

I have two general themes in mind.

The first is the inherent importance of the problem. From whatever vantage point we view our history, and the prospects for its future, the status of the Negro is a central and a tormenting issue. Fundamental conflict over the legal position of the Negro was a basic element in the constitutional system launched in 1787, and variant forms of that conflict have been key factors in almost every stage of its development since. The clash between our professed principles and the Negro's place in society has been the essence of the compromises, in war and in peace, through which we have sought one equilibrium after another in adding states to the Union and in defining and redefining the relative authority of the states and of the nation. The question of rights, privileges and immunities for the Negro has been a crucial factor in determining the underlying alliances of the political order throughout our experience as a republic. And the Negro's plea for recognition as a human being, "created equal," and, therefore, entitled to equal treatment by the law, has been and is the haunting cry which never quite stops echoing in our inner ear, however strong the opposing forces of custom and racial feeling. In recent years, it has been a moving force requiring growth in almost every distinguishable branch of constitutional law, and in many other areas of law as well, from libel and reapportionment to wills, contempt of court, and the law of covenants which do and do not run with the land. Once the country came to agree with the Supreme Court that the Emperor was indeed naked — that our treatment of the Negro has been completely contrary to the most sacred principles of our polity — the idea of the New Model in our law and social arrangements spread with startling rapidity.

My second broad interest here is the richness of the topic as a case study in legal theory. The place of the Negro in our legal system offers a unique opportunity to examine the role of law in the social process, and of the social process in the formation of law. After all, our spectrum extends from chattel slavery — and our law of slavery was the worst in the history of law — past *Dred Scott*,[9] the Civil War, and the *Civil Rights Cases*[10] of 1883 to the extraordinary progress in the direction of equal rights for the Negro made in recent years by the Supreme Court, the Congress, and the people themselves. Such an examination requires us to test all the dazzling hypotheses of legal philosophy about the nature and purposes of law, and about its relationships to custom, reason, authority, morals, and the idea of justice. It permits us to distinguish theories which are consistent with experience from those which are not. In the nature of knowledge, this is an indispensable task. For theories — that is, sets or systems of propositions about reality — can never be proved true. They can, however, be shown to be untrue by demonstrating that our best measures of the external world, approximate as they necessarily are, are incompatible with propositions logically deduced from a particular theory about it. In this way we can at least narrow our search for explanations, and direct our attention to the factors most likely to prove fruitful in revealing the nature of the social process.

What I have particularly in mind is the part which moral elements — that is, both mores and aspiration — play in the process of making law. These are much controverted issues, and my views are not very stylish, I fear. But I should contend that the student of law evades his principal responsibility, and his most difficult one, if he takes an exclusively analytical, linguistic, and positivist approach to law. We saw again this last week the extraordinary phenomenon of a Southern white jury refusing to convict a white man who had almost surely killed a white civil rights worker. The event leaves us with the hollow proposition that under the actual living law of Alabama today, the law at the end of the policeman's stick, the law twelve men in the jury box will enforce, such homicide is not yet a crime. We know that if this rule be in fact the law, it is bad law. What criteria permit us to reach this conviction? What forces in our society, and in the nature of law, can lead such jurors to change their minds? Law is not a passive factor in the movement of society, although it must often defer to forces which for the moment have the larger battalions. Law responds to other social forces, but in turn, and through time, it shapes and influences them.

The status of the Negro in American law is not a pretty story, nor one for squeamish stomachs. It does not permit us to evade the share which inhumanity has played, and plays still, in human affairs, when the strong have a chance to hurt the weak. It does not allow us to forget how close to the surface primitive savagery is, and how powerful the beast within. Here, in sharp and often painful focus, we see the full array of passions and interests which enter into destiny: the force of habit, of greed, and of fear; the power and the weakness of conscience and religion; the thrust of dark passions and aggressive instincts

[9] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
[10] 109 U.S. 3 (1883).

that civilization must always seek to tame, or at least to confine; the mysterious impact of war on men and on societies; the contribution great men and women can sometimes make, if they are in the right places at the right times; the ways in which social change occurs, often, usually, in what seem to be sudden sharp bursts after long periods of latency.

The chronicle is one of horror, but not only of horror. Our treatment of the Negro has created a constant tension between the actual and the acknowledged ideal in our lives. Many chapters of the story are degrading and disgraceful. But the presence of the Negro has been a perpetual challenge to the Puritan spirit at the heart of our psyche. It has required moral exertion of us and given martyrs and heroes their occasions of glory. Thus, the moral element in our affairs has been strengthened and deepened to become their ruling power.

II.

The slavery of the American colonies was not an isolated phenomenon. In part, it represented a survival into the nineteenth century of ancient forms of human subjugation, which even the new birth of freedom during the late eighteenth century could not quite extinguish. In part, however, it represented something quite different: a large-scale adaptation of the ancient tradition of slavery to the imperative demand of the new world for manpower. Slavery increased rapidly in the seventeenth and eighteenth centuries. With immigration and the transportation of indentured servants, it became one of the basic means for providing enough labor to clear the wilderness in most parts of North, South, and Central America. The colonizing labor force contained indentured white men as well as Negro slaves, especially during the seventeenth and early eighteenth centuries — refugees and scoundrels, followers of the Young Pretender and other lost causes, adventurers, peasants forced or induced to migrate, huge numbers of men who bonded themselves for two to eight years in exchange for passage and support. Until it was outstripped by slavery in the middle of the eighteenth century, indentured servitude was the chief form of labor in the Middle Atlantic and Southern North American colonies, and it continued to exist until well after the Revolution. The best estimate is that half the white population south of New England in the colonial period came to America as indentured servants — men recruited in Europe almost as brutally as the blacks were mobilized in Africa, and were treated almost as badly on the journey, and in their places of work.

The status of indentured servants was quite as low as that of black slaves. Their contracts could be sold. They were not allowed to vote, to hold land, to engage in trade, or to serve on juries. They could not marry without the consent of their masters, and they were subject to corporal punishment by the master. The control of rebellious indentured servants was a major problem of public order in most of the American colonies and a major source of humanitarian complaint, both in America and in Britain. Many tricks were used to extend their nominal terms, and they became accustomed to degradation. One of the fascinating hypotheses about social experience advanced in recent years

by Rossiter and others is that the indentured servants of colonial times, deeply injured by their experience, became not the sturdy yeomen and independent artisans of Federalist America, but an intractable mass of backward Southern "poor-whites," the ancestors of the Snopes.[11]

Historians seem generally to agree that Negro slavery developed strongly in the North American colonies only because white servitude could not produce a sufficient labor supply, especially for the colonies where plantation crops prevailed. Reports of the treatment of indentured servants reached Europe and made their recruitment more and more difficult. At the same time, the African slave trade became diabolically efficient, often with the cooperation of tribal chiefs. The first Negroes who came, in 1619, were probably not slaves at all. For fifty years or so, most Negroes who arrived or were brought here were indentured servants or free immigrants. The records notice several, perhaps many, who became free landholders, businessmen, and the masters of other servants. Some were given land under the headrights system — that is, they were given land grants of 50 acres for each European or African they brought into the colonies. In early times, slaves and indentured servants were treated equally badly. They lived together, without evidence of race feeling or caste distinction.

Soon, however, the treatment of the Negro became more severe, and the main features of American chattel slavery emerged. Correlatively, the South became attached to the conviction that its economy was unworkable without slavery. For many, this view was transformed into a doctrine justified by what they regarded as the Negro's inherent biological inferiority, by Biblical authority, and by natural right — a kind of "chosen people" doctrine. From the 1660's on — the time of the Restoration in England — slavery became the dominant but not the universal position of the Negro in the United States. Slavery itself took on its characteristic American features, notably different from those in the Spanish and Portuguese colonies. Slavery was perpetual and hereditary, and all sorts of presumptions and restraints developed to limit the possibility of freedom for the slave, even by the will or deed of his master. No official made inquiry about their humane treatment, as was the case in Spanish and Portuguese territory. They could not testify in courts, work for pay, own or inherit land, or obtain much legal protection, even against murder. It was a crime in many colonies and states to teach Negroes to read or to use firearms, or to sell them drink. They were punished more severely than white men for the same offenses. And running away was of course their ultimate crime.

As the institution of slavery crystallized, it affected the status of all Negroes, even the freed Negroes living in the North. They were a caste apart in the law of almost every state, except perhaps Vermont, with special provisions about voting, the ownership of land, crime, their status as witnesses, and so on.

---

[11] See ROSSITER, SEEDTIME OF THE REPUBLIC 91 (1953). See generally FARNAM, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860, at 60–70 (1938). The generalization is hardly universal. Taney's ancestors were indentured servants. See LEWIS, WITHOUT FEAR OR FAVOR 7 (1965).

Thus a poison entered our lives and pervaded every aspect of them. The Negro was forced to wear a badge of degradation which only the proudest spirits could totally reject or ignore. Self-hatred, a lack of self-respect and self-confidence, inevitably colored almost every Negro's estimate of himself. The effect of our caste system has been almost worse for the Master Race. Both white and Negro Americans were schooled in habits which grip us still as corrosive memories.

Leading spirits in all the colonies protested against slavery, starting with the Quakers in 1671. Jefferson sought to have a paragraph against slavery and the slave trade put into the Declaration of Independence, and he proposed in 1779 that Virginia abolish slavery gradually. Tom Paine denounced it. George Washington favored emancipation, and his will directed that all his slaves be freed on his widow's death. Judge Tucker of Virginia wrote an early book against slavery, and the Congregational preachers of New England, starting with Jonathan Edwards, Ezra Stiles, and Leonard Bacon, took the lead in preparing public opinion for the abolitionists of the generation which began with Garrison's first number of the *Liberator* in 1830.[12]

While there was considerable progress toward liberty in the North during the era of the Revolution, the egalitarianism of the Declaration of Independence was only rarely and gradually applied to the status of the slave. Not many saw the paradoxical contrast between the social ideals of the Declaration and the position of the Negro — and of women, for that matter. As late as the mid-nineteenth century, the most humane and compassionate opinion — that of Lincoln or Monroe, for example — was that the Negro was an unfortunate person of inferior attainments, treated very badly by the whites, to be sure, but not conceivably the white man's equal. For such men, the right solution for the Negro problem was to return the Negroes to Africa. Few were prepared to act decisively against the weight of custom, and against the increasingly panicky and fearful resistance of the South, convinced as it was that its autonomy, and indeed its freedom, were threatened by the protest against slavery.

Hamilton and many other participants in the Convention believed that the Constitution would never have been made unless its several compromises on slavery were accepted, particularly the provision of article I, section 2, adapted from the tax provisions of the Articles, that three-fifths of the slaves, discreetly noticed as "all other persons" to distinguish them from "free persons," should be counted in apportioning representatives to the states. Secondly, one should mention the Sherman Compromise, giving each state two Senators, although many factors other than the problem of safeguarding slavery entered into this rule. Third, there was the fugitive slave provision of article IV, section 2, denying the principle of *Somerset*'s case in the law of the United States, and finally, the first clause of article I, section 9, supported by article V, denying Congress the power to prohibit the slave trade until 1808.

---

[12] A convenient review of the literature, as well as a good deal of the original research, appears in STAMPP, THE PECULIAR INSTITUTION (1956). A classic on South American slavery (and on the social process) is FREYRE, THE MASTERS AND THE SLAVES (2d Eng. ed. 1946). See also FARNAM, *op. cit. supra* note 11, at 167–79; FRANKLIN, FROM SLAVERY TO FREEDOM (1947).

"Without this indulgence," Hamilton concluded, "no Union could possibly have been formed." [13]

The fugitive slave section of article IV was an increased source of tension as the nation lurched towards civil war. It provided that "no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on Claim of the Party to whom such service or labor may be due."

This provision — not notably ambiguous as constitutional sentences go — defines one dimension of the constitutional and political conflict which led to the Civil War.

If every Northern state had to yield up fugitive slaves to their masters, could those states abolish slavery in fact? Could they enfranchise Negroes? Could free Negroes living in the North go into slave states, and claim there the privilege and immunities of United States citizenship? Was the Northwest Ordinance valid in banning slavery in that territory? Were the great Whig compromises of 1820 and 1850 valid, in the face of this ominous provision? By the same token, could the Congress abolish slavery in the territories? Could a state enslave a free Negro if it could catch him?

In that period, many Southerners strongly defended the Constitution as a national limitation on the authority of the states. Some of the abolitionists were among the strongest advocates of secession.

The Compromise of 1820, which kept the balance between North and South in the Senate, adjourned the issue of slavery for thirty years as an ultimate test of the institutions of Union. But those thirty years were an era of transformation. Industries, universities, cities, and provinces sprang up. Jackson was one symbol of the change, Melville, Thoreau, Hawthorne, and Emerson were others. Especially after 1830, it was one of those times when a mysterious conjuncture of forces precipitates a change in the moral climate. In every country of the world, suddenly, and without much warning, men of all political temperaments, conservative and liberal, began to agitate for social action against cruelties and injustices long ignored. The forces of humanitarianism touched every phase of social experience. There were poor laws and factory laws, concern about child labor and the rights of women, prison reform, agitation to prevent cruelty to animals, a radical enlargement of the right to vote. And above all, a worldwide movement, led by Wilberforce in England, fought to end slavery.

The antislavery movement was hardly one of mass sentiment, at least in the United States.[14] The Antislavery Society, and the various other branches and sects of the movement, were led by a tiny dedicated élite. At most, the abolitionist movement, even in New England, did not become more than a small, despised band of prophets until well after the beginning of the Civil War. Their support was a political liability even in the election of 1860.

---

[13] FARNAM, *op. cit. supra* note 11, at 125.

[14] See LLOYD, THE SLAVERY CONTROVERSY — 1831–1860 (1939); MCPHERSON, THE STRUGGLE FOR EQUALITY (1964).

Yet their work offers a fascinating opportunity to observe the functions of leadership in the formation of opinion, and in the preparations for political action. The abolitionists had friends of influence, and leaders who were heard, even if they were scorned and mobbed. For a long time, they challenged the conscience of the nation, and posed the issues which were seen later, when the crisis came, to offer alternative courses.

The rising vehemence of the abolitionist outcry deepened the sense of fear in the South, as the country expanded to the west, and the even balance of North and South in Congress became more and more manifestly a chimera for the future. The controversies over the admission of new states were colored by panic, which was in turn heightened by the lightning flash of John Brown's raids.

In this setting, we see *Dred Scott* as a final attempt to restore the old balance and order to a political system in crisis. One of the main structural elements of the Union, as it had hitherto existed, was disintegrating. The nation had to be rebuilt on a new footing. Could that task be accomplished in peace?

It is of absorbing interest to reexamine *Dred Scott* as part of this process. Every schoolboy knows it was Taney's great mistake, a dreadful act of judicial usurpation, a self-inflicted wound which is supposed to have weakened the Court for a long time — although the Court issued one of its most powerful and confident decisions, *Ex Parte Milligan*,[15] less than ten years later. Having recited these clichés, we generally fail to read the opinions in the case, and turn to the next chapter.

Dred Scott repays a modern reading, both as a political effort that failed, and as an exposition of the concept of national citizenship, the indispensable basis for contemporary civil rights legislation. The reasoning of *Dred Scott* hardly supports the stereotype image of Taney as a defender of slavery and states' rights. Its flaw was more fundamental than the errors of law and the miscalculations of politics on which it rests. In *Dred Scott*, Taney committed the truly fatal error for judges, that of insight and intuition. He failed where Mansfield succeeded so magnificently in *Somerset*, that is, in perceiving the true condition of public opinion, even though it was inchoate and perhaps unconscious before he spoke, and, therefore, the possible scope of judicial leadership. In *Somerset*, Mansfield framed the issue for decision by stating a premise so majestic, and seemingly so self-evident, that no one noticed its revolutionary character: Slavery, he said, is "so odious that nothing can be suffered to support it, but positive law." Once this sentence was put at the top of the page, the result in the case was assured. There were no statutes with which the slave owner could overcome the presumptions Mansfield put in his path. And Mansfield swept away earlier judicial decisions of contrary import.

But Mansfield's premise was by no means self-evident. As Lord Stowell tartly observed, "ancient custom is generally acknowledged as a just foundation of all law." With some bewilderment, however, Stowell recognized the binding quality of Mansfield's achievement, in holding that the owners of slaves had

[15] 71 U.S. (4 Wall.) 2 (1867).

no authority or control over them in England, nor any power of sending them back to the colonies in chains.

> Thus fell, after only two-and-twenty years, in which decisions of great authority had been delivered by lawyers of the greatest ability in this country, a system, confirmed by a practice which had obtained without exception ever since the institution of slavery in the colonies, and had likewise been supported by the general practice of this nation and by the public establishment of its Government, and it fell without any apparent opposition on the part of the public. The suddenness of this conversion almost puts one in mind of what is mentioned by an eminent author, on a very different occasion, in the Roman History, "*Ad primum nuntium cladis Pompeianae populus Romanus repente factus est alius*": the people of Rome suddenly became quite another people.[16]

It is easy to understand Taney's mistake in *Dred Scott.* He was eighty years old, and had just lost his wife and daughter under harrowing circumstances. Reasonable, sober men, devoted to the Union, hoped for a new and sagacious compromise, like that of 1820, which could conciliate North and South and allow slavery to fade away gradually, as villainage had faded in England. In the troubled decade of the 1850's, the appeal of *Dred Scott*'s desperate remedy is apparent. Most moderate opinion hoped the Supreme Court would issue a Solomonic judgment that could achieve magical results. The unthinkable alternative of war distorted judgment. The old Federalist and Jacksonian Chief Justice from Maryland, Catholic, pacific, and devoted to the nation, sought to restore the rule that had harmoniously corresponded to public feeling in 1789 and 1820 — the premise of the Negro as a person apart in our law. His intuition failed him. He did not perceive that the social and moral basis for the rule had vanished, so that the rule itself, and all its corollaries, had become obsolete. And above all, he failed to divine, as Mansfield had in *Somerset,* a clarifying hypothesis buried in the integuments of the future, and waiting to be born.

Perhaps there was no such rule. It is generally thought that the conflict was beyond reach of the courts. Surely no solution was conceivable without nullifying at least the fugitive slave provision of the Constitution, which had in all probability been addressed to the decision in *Somerset* in the first place. Within a few years, Taney took a long step in that direction, in holding that the duty of a state under article IV, section 2 of the Constitution to deliver up a fugitive from justice, while mandatory, was political, and could not be enforced by the courts.[17] But even if that approach would have been adequate, it came too late.

The opinion in *Dred Scott,* which after a time became a target for abolitionist speakers, dissolved under the pressure of events, adding to the anxieties of the time. It threw doubt on the Whig compromises of 1820 and 1850, and made the equilibrium of Congress hopelessly unstable. The parties were split into

---

[16] The King v. Allen, 2 Hagg. 94, 106, 166 Eng. Rep. 179, 183 (Adm. 1827). See also Osborn v. Nicholson, 80 U.S. (13 Wall.) 654, 660–61 (1872); Scott v. Sandford, 60 U.S. (19 How.) 393, 407–27, 534–36, 590–600, 624–27 (1857).

[17] Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861).

fragments, as the debate between Douglas and Lincoln was reenacted in every village and town.

The election of 1860 mirrored the confusion of the public mind. The Republican nominee was moderate and ambiguous on the Negro question, against slavery and against abolition as well. While some of his supporters — Seward and Andrew, notably — were strongly abolitionist, abolition was avoided in the campaign as warmongering would be avoided today. The abolitionist sentiment as such was weak: Lincoln carried New York by 50,000, but a constitutional amendment easing Negro suffrage lost 2 to 1.[18] Nonetheless, Lincoln represented "an anti-slavery idea," as Wendell Phillips said, and the country understood it.[19]

The firing on Fort Sumter released reservoirs of passion no one knew were there. The mystical notion of the Constitution as an indissoluble union of people, not states, proved its transcendence. For the longest, bloodiest years of war of the century, the people testified to their faith in this instinct of union. As the war progressed, the slavery issue became as vital to the war effort as the idea of union itself. Despite the resistance and hesitations of the politicians, and the strong racial prejudices of the people of the North, the atmosphere toward abolition changed. The abolitionists' meetings were larger and more fashionable. The Republican Party openly sought their help both in 1862 and in 1864. In *Dred Scott*, one of Taney's most telling arguments to show that Negroes were not regarded as part of the sovereign constituent mass of "the people of the United States" in 1789 — "the political community formed and brought into existence by the Constitution of the United States" [20] — was that they were often disqualified for military service by the laws of the states.[21] Hence a strenuous effort was made, over bitter resistance, to form Negro regiments and to send them to the front.[22] For the simplest and most direct of reasons, the Republican Party began to press the cause of enfranchising the Negro, North and South.[23]

The impulse for reform, so unwillingly and almost absent-mindedly kindled by the circumstances of the war, flickered out after eleven postwar years of violent controversy. Three great amendments were passed, and many changes in the position of the Negro began to take place. The abolitionist society was disbanded and split up on the ground that its primary goal, the abolition of slavery, had been accomplished. Legislation to provide land and special forms of education for the freed Negro failed of passage. These two causes, fundamental to the realization of equality for the Negro, were left to weak pilot projects financed and staffed by private groups. The earnest efforts of philanthropy were commendable, and accomplished much. But they were not an

---

[18] McPherson, *op. cit. supra* note 14, at 25.

[19] *Id.* at 27.

[20] Scott v. Sandford, 60 U.S. (19 How.) 393, 403 (1857).

[21] *Id.* at 415. His other argument at this level, equally symbolic, was the mass of laws of the period against marriage between members of different races. *Id.* at 408–16.

[22] McPherson, *op. cit. supra* note 14, 192–220; McPherson, The Negro's Civil War, 143–244 (1965).

[23] Woodward, Reunion and Reaction 94–95 (1951).

equivalent in any way of massive governmental action commensurate in scale with the magnitude of the problem.

Meanwhile, political resistance to reform grew in strength. By 1877, the nation had become tired of occupying the South, and tired of the turbulence to which the struggle for Negro rights seemed to lead. A movement symbolized by the Ku Klux Klan, and in many places led by it, had helped to mobilize Southern support for massive resistance to national authority. Those in the South who held other views were intimidated or discouraged. Many left the South altogether.

President Grant's Administration did not undertake to enforce the Civil Rights Acts or the Force Act with any vigor. The Freedmen's Bureau was abolished. The so-called "Radicals" no longer controlled the Republican Party. Their place was taken, more and more openly, by men of the old Whig spirit, who wished to reach an accommodation with the "propertied classes" of the South, and terminate the era of violence and instability which prevailed in many parts of the South.

The contest over the outcome of the Hayes-Tilden election of 1876 gave men of this persuasion their opportunity. Apparently won by the Democratic candidate, a Governor of New York, the election was so close, and the returns from many states so open to objection, that the result was in doubt until the moment before Inauguration Day, and the country witnessed ominous preparations for the renewal of armed conflict. The Compromise of 1877 which led to the inauguration of President Hayes still has aspects of mystery, despite Professor Woodward's magisterial and authoritative study of the subject.[24]

What is certain about the atmosphere of the Compromise, however, is that it involved, on one side, an acceptance of the Republican candidate for the Presidency, and the consolidation of a powerful Republican Party, based not on abolitionist New England, and on Negro votes in the South, but on the agrarian and conservative Middle West and Northwest, where the Copperhead sentiment still flourished. Thus a tacit coalition emerged between Southern Democrats and some Northern Republicans as the normal ruling force in our politics — the ultimate power bloc to which authority always tended to return. On the other side, the Compromise implied an end of military occupation and of Reconstruction government in the South. Its hidden premise was the restoration of white rule in the South, and the disenfranchisement of the Negro. The nation walked by on the other side as riot, massacre, boycott and lynching were used to deprive the Southern Negro of his vote and degrade him anew to the caste of helot.[25]

We allowed violence to nullify the Constitution, and condoned a political order based on disobedience to law. The North yielded to mob action and to Southern resistance in the Confederate spirit, based on mob action. The South abandoned its effort to expand to the west. But it clung to white supremacy

---

[24] *Ibid.* See generally BUCK, THE ROAD TO REUNION — 1865–1900 (1937); STAMPP, THE ERA OF RECONSTRUCTION — 1865–1877 (1965).

[25] See, *e.g.*, MAGRATH, MORRISON R. WAITE 154–71 (1963).

in the South itself. A virtual moratorium on the enforcement of the fourteenth and fifteenth amendment emerged, at least as to Negro rights in the South.

Troubled men, North and South, said that "after all, the Negro was not yet ready" for equal citizenship. They comforted themselves with the thought that the disenfranchisement of the Negro, and the coming to power of Jim Crow, were transitory phenomena, measuring no more than necessary delays in the fulfillment of the promise of fourteenth and fifteenth amendments. Passion and custom were too strong at the moment for the enforcement of the law, they concluded. But the education and social advance of the Negro, and the ultimate egalitarianism of the American people, would "gradually" prevail. Such, at least, was their hope.

After 1877, the political life of the country turned away from the Negro problem, and the reforming spirit was absorbed in private efforts to help the Negro through education and social development. The Force Act was repealed; the Supreme Court, reflecting the spirit of the Gilded Age, declared parts of the Civil Rights Act to be unconstitutional [26] and later upheld the constitutionality of segregation.[27] The Government in Washington treated the undeniably constitutional chapters of the Civil Rights Acts — most particularly those dealing with the selection of jurors and with voting — as dead letters. The nonenforcement of the fourteenth and fifteenth amendments became a basic element in the foundation of the political system, and a basic, if guilty, expectation of the white South.

But the Coalition of 1877 did not rule unchallenged, even in the period before 1914. The industrial and financial revolution of the late nineteenth century and early twentieth century stimulated its counter-thesis. The oligarchs and titans of the great new companies aroused fear as well as envy. Small-town independent business and regional leaders rallied against the specter of complete economic control from New York. Agrarian protest swelled, and found effective political expression in the Granger movement and in Populism. Trade unions were formed, often led by Socialists linked to the various Socialist movements of Europe. Journalists and other writers stirred an outcry against the concentration and abuse of economic and political power. And many of our best spirits devoted themselves to protest against the materialism and vulgarity they found to be rampant in American life. Recurring economic depressions invariably fortified the chorus of protest, and strengthened political groups concerned with the grievances behind such protests.

Inevitably and invariably, justice for the Negro emerged as an object of all our progressive movements, although not until recently as one of their major goals. Some of the radical Progressive leaders were anti-Negro, antiforeign, anti-Catholic, and anti-Semitic. But they were exceptional. The spirit of social advance which they expressed and embraced could not resist the rightness of the Negro's claim.

---

[26] Civil Rights Cases, 109 U.S. 3 (1883).

[27] Plessy v. Ferguson, 163 U.S. 537 (1896).

Meanwhile, year by year, the industrial revolution drew people from farms to factories, and from rural areas to the growing cities. More and more Negroes joined in the migration. A slowly rising fraction of the Negro population, armed with high school or college diplomas, undertook middle-class vocations and middle-class patterns of life.

The accident of Theodore Roosevelt's unsatisfied ambition played a significant part in the political history of the Negro's cause, as it did in the political history of the Republic. The Republican Party never fully recovered from the Bull Moose campaign of 1912, which was followed by the Progressive Party effort led by Senators LaFollette and Wheeler in 1924. During his first term, President Franklin Roosevelt was able to speed up the exodus from the Republican Party his Republican cousin had begun twenty years before. Senator Norris and many other Progressive Republicans became Roosevelt Democrats during the early thirties, and then simply Democrats who supported Presidents Truman, Kennedy and Johnson, and backed Aldai Stevenson as a candidate in 1952 and 1956. Attracted by the welfare programs and the liberal spirit of the New Deal and the Fair Deal, the growing mass of Negro voters in the North and the scattered Negro voters of some Southern cities were notable among the Bull Moose pilgrims who left the Republican Party. The Negro voter became one of the pillars of the Democratic Party, with Labor and the urban interest generally, as that party reoriented itself imaginatively to the pattern of underlying change in American society.

III.

These political events did not occur in a vacuum. The nation grew and was industrialized. It suffered the pangs of Manifest Destiny, and became a participant in world affairs, with commitments in the Caribbean and the Pacific, and a growing sensitivity to the balance of power in Europe. It undertook the regulation of railroads and other national utilities, an antitrust policy, and national policies toward agriculture, labor and banking. The elections reflected the changing concerns, and the changing needs, of a small, isolated, homogeneous, agricultural, rural nation which was rapidly becoming a vast, urban, cosmopolitan, industrial leader in world politics.

The first economic need of the men who tamed the continent has always been manpower — an insatiable and imperious demand which led us to indentured servitude and then to slavery, and later to immigration on a massive scale. The perennial shortage of labor in the American economy has been the source of some of our most difficult social problems — that of the Negro, manifestly; those of the melting pot in our great cities; and later, the resistance to immigration, and the nostalgic desire to restore the Anglo-Saxon or Nordic atmosphere of an earlier America, represented by the Oriental Exclusion Acts, and by the Immigration Act of 1924. That statute, passed under trade union pressure, drastically reduced the flow of immigrants which had made economic growth possible between 1880 and the mid-twenties.

In the course of this far-reaching transformation, the Negro ceased to be the ignorant and forlorn Freedman of the 1870's and 1880's, and became more and

more visibly a member of the urban melting pot. A large fraction of the Negro population remained in the South as agricultural workers, at least until the decline of cotton in the 1930's, and the industrial migrations of the Second World War. But the advance guard of Negro immigrants in the cities of the North began to endure the trials and strains of assimilation as early as the turn of the century, and a significant number of them emerged with success.

The Negro, of course, faced special hazards in the melting pot, and he faces special hazards still. Like other immigrants reared in primitive agricultural villages, the Southern farmhand in a big Northern city, be he white or Negro, suffers the handicap of not being familiar with the skills and habits of modern urban life. The Negro rarely comes into the melting pot as a toolmaker, or mechanic, or welder, or even as a carpenter or plumber, because tight restrictions on apprenticeship have for generations excluded him from training in the basic trades of advanced technology. Sometimes not even the menial or the Hunky jobs are open to him. The curse of slavery has been a terrible burden, both for white men and for Negroes, and it has been felt, and is felt today, in all our arrangements for living, working, and schooling.

Despite our pervasive heritage of racial tension, however, the melting pot worked for the Negro as it did for the white immigrant — not so quickly, perhaps, as in the case of some white groups, particularly well prepared for urban life, but quite as rapidly, in all probability, as the average. In our frustration at the slowness and difficulty of the process of assimilation, we often forget that the Negro immigrant to the North is by far the most recent of our mass immigrants. In many cities of the North, the Negro population has risen from 5 per cent to 20 per cent during the last twenty years, almost entirely as a result of migration from the rural South. This vast movement has taken place at a time when other immigration has been largely confined to middle-class or near-middle-class refugees, or to the relatives of citizens, enjoying special advantages on the ladder. We have forgotten what the immigration of the late nineteenth century was like, with its "huddled masses" of the poor and ignorant, its alien atmosphere, and its often disorderly circumstances. Large-scale white immigration came to an end before World War I, and was never resumed in the same way again.

As soon as they were able to do so, the successful early Negro migrants in the North began campaigns to protect the rights of Negroes, and to improve their position. These voluntary societies, many of which trace their lineage back to the abolitionist and Negro welfare groups of the nineteenth century, have been indispensable factors in organizing and directing the campaigns which prepared the way for the Civil Rights Revolution of the postwar period and particularly for decisive national action in 1964 and 1965. These groups have worked in many areas, and at many levels. Some have pursued quiet programs of persuasion in individual communities, arranging with those in authority to have private or public barriers to equality removed. Others have functioned in the realm of opinion, and the political realm, seeking support for the idea of progress.

In retrospect, the most important and effective of these groups — the organ whose achievement made that of all the others possible — was the Legal Defense and Education Fund of the National Association for the Advancement of Colored People. That organization conceived and applied the bold and simple idea of appealing to the law to enforce the law. Their original plans were by no means a systematic blueprint for the campaign which emerged, case by case, from the process of their experience. But the germ was there, based on the realization that the ultimate moving power in American society is the body of ideals expressed in the Declaration of Independence and the Constitution, and enforced by the courts as law. All the rest followed — the prodding, restless demonstrations on the streets, the meetings, the marches, the sit-ins and the petitions. For the purpose of the protests was to stir a nation to live by its own creed, and to obey its own law, even when the law required, and imposed, a political and social revolution.

To realize why their program of change through law accomplished so much, and how it aroused the nation to respond, we must go back to the 1880's again, and recall the way the law developed.

IV.

While the inauguration of President Hayes began a period of self-deception and discreet silence on the problem of Negro rights, the Supreme Court did not openly suspend all attempts to apply and interpret the fourteenth and fifteenth amendments.

In the *Civil Rights Cases* of 1883, to be sure, the Court accepted and ratified the political compromise of 1877. Over the dissent of Justice Harlan, it held the public accommodations sections of the Civil Rights Acts to be unconstitutional, on the ground that while the fourteenth amendment was a prohibition only against action by the states, the federal statute should be considered to deal with private actions, not actions by the states, in the absence of a legislative finding that in some states segregation of the races in places of public accommodation was required either by state law, or by "custom having the force of law." [28] While the Court thus carefully preserved the possibility that Congress and the Executive might try again, the political equilibrium on the subject was not favorable to such an attempt, and the moratorium on the enforcement of the amendments in the South, as we have noted, became one of the structural elements in American politics.

But the Supreme Court did not treat the fourteenth amendment as suspended in this crucial period. On the contrary, for two generations, it was one of the most fashionable provisions of the Constitution, being invoked repeatedly as the basis for striking down state laws regulating business. And, starting before the turn of the century, the "due process" clause of the fourteenth amendment, and the "equal protection" clause as well, began to be applied as tests for the legality of criminal trials in the state courts, including trials clouded by force and the threat of force. Somewhat later, the amendment was also in-

[28] Civil Rights Caes, 109 U.S. 3, 14, 16 (1883).

voked in another important line of cases, to protect freedom of speech and of the press, freedom of religion, and other personal and political rights.

Before 1930, then, the Supreme Court had established two positions of central importance to the Civil Rights Revolution of the last twenty years — first, it had made the Constitution, and the process of constitutional adjudication, a far more active and continuous force in American public life than had ever been the case before, and it had won general acceptance for its role as the active protector of constitutional rights; and secondly, it built a corpus of precedents from which the modern law of personal liberty emerged naturally, and with the invaluable sanction of past authority.

The true turning point in the recent history of the Court is the Chief Justiceship of Charles Evans Hughes. The moral temper of the country was changing, under the impact of the Great Depression, and the experience of war and the threat of war. The law reflected that change, and played a considerable part in bringing it about. Each decision applying a principle of constitutional order opened a debate in the legislatures, the press, and the classrooms of the nation — a debate which often reached the country stores and the political campaigns as well. And each case suggested new possibilities to lawyers, and, therefore, tended to invite further tests of principle through further litigation.

During the 1930's, the constitutional law of personal and civil rights began to grow. The Supreme Court dealt with a surprising number of problems, from freedom of spech and of religion to martial law, the right to vote, and the concept of due process in the criminal trial. And, in case after warning case, it began to enforce the fourteenth amendment to protect Negroes against discrimination. The justices seemed to be alerting the nation to the fact that the old moratorium of 1877 was crumbling away, and would not long endure.

The civil liberties and Negro organizations responded to the Court's lead and began to bring cases far more frequently than ever before. And, in the normal manner of a common law court, the Supreme Court dealt with the questions brought before it, sometimes upholding, and sometimes denying the claim of right.

Thus, the social and political experiences that altered the moral climate of the country also altered the law. In turn, the decisions and opinions of the courts, and notably those of the Supreme Court, exerted a powerful and far-reaching influence on the national mind. The renewed protection of Negro rights in the courts during the 1930's emerged as an integral part of a wider development — a fresh, confident assertion of the spirit of liberty and equality in many realms and at many levels of American life: in Washington and in the states, in the universities and in the churches, in business, in law, in politics and in social life. It was one of those remarkable moments when the impulse for improvement was strong and made itself universally felt. The progressive feeling naturally embraced the question of Negro rights.

V.

These, then, were the main forces behind the breakthrough in Negro rights represented in part by the Civil Rights Act of 1964 and the Voting Rights Act

of 1965. Changes in the outlook and experience of our people, shaped and brought into focus as changes in law, have forced the nation at last to realize that we have tolerated hypocrisy or worse in the surviving resistance to the fourteenth and fifteenth amendments, and in the political arrangements based on the Compromise of 1877.

The intensity of the yearning for progress was greatly heightened by World War II, and by the strains and pressures of the period of Cold War. So far as the rights of the Negro are concerned, it became more and more visibly absurd to require him to serve in the armed forces abroad, and then to deny him full equality as a citizen at home. Race has taken on altogether new dimensions as a political and social problem, with the end of Empire in the world, the rising importance of the colored nations of Africa and Asia, and the impact of Hitlerism on the modern mind.

While there was a pause in our politics after World War II, as there was after the Civil War and after World War I, an attempt to return to the supposed normalcy of old-fashioned conservatism, the underlying will of the country required another kind of leadership. The decisive political education of the nation had been conducted by President Roosevelt. And the outlook of the New Deal is the foundation for our modern creed of political action. It was not an accident in 1960 that the nation accepted President Kennedy's call for renewed social change — and incidentally buried in the process the ancient prejudice against equality for Catholics. Nor is it an accident that leadership has come to President Johnson, who combines qualities of John Bunyan and Paul Bunyan in seeking to fulfill in fact the social aspirations to which most Americans have long been committed by their history.

On the question of Negro rights, we have lived through what can be described as a political symphony of democracy in action.

In the first movement, the Supreme Court declared the theme with great force, and in terms which finally demanded a political response. For a generation or more, the Supreme Court had challenged the nation to make good its promise of equality to the Negro. Recognizing the changes which have occurred in society, in the status of the Negro, and in other parts of the law of the fourteenth amendment, the Court decided case after case in favor of the Negro — cases dealing with the use of public parks, the right to vote in primary elections, the right to attend state-supported law schools, colleges, and other institutions, the selection of jurors, and other issues.

The process of challenge reached its culminating point in *Brown v. Board of Educ.*,[29] in 1954, dealing with segregation in elementary schools. That case stirred the country as none of its predecessors had done, for it touched the daily life of all the people, and put the issue in a form which politics could no longer ignore.

Congress then declared the second movement of the symphony. Slowly, reluctantly, it considered the implications of the problem for a decade, while

[29] 347 U.S. 483 (1954).

the reapportionment movement began to alter the historic balance of political power within the states, and to sap the walls of old forts and citadels.

In this period, Southern resistance to the law became quite frantic. Officials avoided open contempt of court orders, but used every other device ingenious and often desperate men could think of to circumvent them. Violence against the Civil Rights petitioners was endemic, and went almost entirely unpunished, even when it was murder. The movement of civil disobedience to law, led by men who had taken oaths to uphold the Constitution, spread throughout the South, and reached into other parts of the nation as well. The United States was at last forced to recognize that it faced something approaching an insurrection, in a series of clashes with Southern officials closely analogous to the revolt of the French officers in Algeria.[30]

Southern leaders, mindful of the lessons of 1877, made strenuous political efforts to reestablish the old bargain which had permitted them to postpone the consequences of Appomattox for almost a century. Starting in 1948, some of them sought to precipitate another electoral deadlock in which they could hope to determine the choice of a President on their own terms. And in Congress, they fought to preserve their historic alliance with leading members of the Republican Party.

Finally, after ten years of deliberation, Congress responded, and responded with overwhelming force, in the Civil Rights Act of 1964. Many factors converged to produce its fully considered action in that year — despite the fact that it was an election year, and a year when many congressmen faced disturbing hazards at the polls. There was the majestic civil rights demonstration of 1963 in Washington, and other unmistakable manifestations of deep public feeling. The zeal and force of President Johnson's leadership, and the poignant memory of President Kennedy's death, played significant parts in the timing of the event. The country came to sense the nature and gravity of the crisis — a crisis of legality itself, as well as one of justice in law. Television brought into every home the spectacle of police brutality toward peaceful civil rights demonstrators and of Southern officials and Southern mobs defying the law. There was somber realization, too, of what was implicit in the reluctance of Southern juries to convict men of crimes linked to the civil rights movement, even when their crime was murder. In the end, for most Senators and congressmen, their vote for the Civil Rights Act of 1964 was an act of conscience and of duty. They were receiving masses of hostile mail. They could not estimate the extent of the so-called white "back-lash" they faced at the elections in the fall. But they knew, too, that the Supreme Court was right in seeking to enforce the fourteenth amendment against racial discrimination. And, having seen the face of anarchy, they voted to put the full power of the federal government behind the judges' quest for lawful order.

The overwhelming vote of the Congress for the Civil Rights Acts of 1964 and 1965 in effect ratified the work of the Supreme Court in this field during the long generation since Chief Justice Hughes's appointment in 1930. And, by

[30] FRIEDMAN, SOUTHERN JUSTICE (1965); MORGAN, A TIME TO SPEAK (1964).

an accident of history, both the substance of the civil rights law and the historic and juridical legitimacy of the Supreme Court's conception of its role were placed squarely in issue by the Presidential campaign of 1964. The election of 1964 was, among other things, a referendum of both subjects, because the candidates took explicit and altogether different positions on them.

Thus, with a symmetry and clarity rarely found in the political life of democracy, the people themselves ratified what the Court and Congress had done. Their vote, the ultimate reservoir of sovereignty, gave renewed life to the Constitution, and a renewed mandate to the Court.

And, at long last, it interred the Compromise of 1877.

VI.

My purpose in this lecture was to consider law not as a static body of rules, but as a way of making decisions of policy — a method using certain modes of thought, and certain rules of procedure, whose goal and end is to help the actual approach the ideal posited in our minds by history and our sense of justice.

I began by recalling the position of the Negro as a degraded slave, entitled to no rights, in the famous phrase of *Dred Scott*, the white man was bound to respect. The burden of that history is not easy to escape, either for the white man or for the Negro. In quick review, we then reminded ourselves of the several chapters of the story — the rise and fall of movements of reform; the compromises engineered by the great Whigs, as the nation flowed westward and the collapse of their work in the tragedy of the Civil War; the period of reconstruction, and that of quiescence after 1877, while the nation concentrated on building industries and cities; the progressive movement, which began again to stir the nation's conscience; the wars of the twentieth century, the Depression, and now the extraordinary age in which we live — one dominated by a social revolution so pervasive and so familiar that we scarcely notice it. It is a revolution of success, and of growing success, in all the capitalist countries of the West. The capitalist nations are moving ahead far more rapidly in every respect than the Communist or underdeveloped countries, and moving ahead in terms of their own ideals. There are many reasons for the phenomenon. The most important is an increasing confidence in their ability to order their affairs in ways which permit them to fulfill their ideal of social justice.

In our country, the Supreme Court has been a major source of our concept of the ideal as the interpreter of the Constitution in a wide area of social policy. Over a generation, and with increasing insistence, the Court has appealed to the country, by reminding us that we have made promises we have not kept, and that those promises represent our highest aspirations. For the Court, this is not a usurpation of function, but a fulfillment of its peculiar and particular function as a spokesman of law. The Court has thus helped to maintain a creative tension in our minds between social actuality and our shared notion of what society ought to become. In the intellectual and moral climate of this time, the Court has proposed and the nation has accepted great strides forward

in law, strides intended to help achieve liberty and equality, and to make fraternity more nearly conceivable.

In part, the strange and disturbing history of the Negro in our law is no more than a special instance of the conflict between custom and positive law, and between the positive law at any moment and the goal for law which is the "compass" of our policy, in Lord Radcliffe's arresting phrase. In part, however, it has been something more: a clash between authority and anarchy, a crisis not of law but of legality itself. When governors and legislators and state police openly or secretly resist the plain command of law, our system of law is challenged as it has not been challenged for a century. In this clash, those like Governor Wallace who advocate and practice civil disobedience defy what Ortega y Gasset calls the *concordia* of society — the indispensable concord and agreement, the universal consensus on the fundamental procedural rules and norms of the civil order, which alone make it possible to enjoy a social life ordered by law.